

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge, Second Judicial Circuit
Case No. 2018CP0200675

Appellate Case No. 2019-000288

Ex parte: Daniel Geitner,

Appellant,

In re: Kelly Sims,

Respondent,

v.

Sharon Enteen-Prusso a/k/a
Sharon Enteen, and
Falcon Ridge, Inc.,

Defendants.

BRIEF OF APPELLANT

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COMES NOW Daniel Geitner, non-party witness below and Appellant herein (“Mr. Geitner”), and files this his *Brief of Appellant* for the appeal of that certain order entered January 16, 2019 (“Trial Court Order”), in the Court of Common Pleas of Aiken County, Civil Action File Number 2018CP0200675 (“Trial Court”), showing the Court as follows:

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Trial Court Order should be reversed for failing to make specific findings as to the factors to be considered in determining the reasonableness of requested attorneys’ fees.
- II. Whether the requested attorneys’ fees are reasonable where they include unnecessary work, work on matters unrelated to the motion to compel, the legal work involved was neither complex nor extensive, and the only evidence of Georgia counsel’s standing and quality of work in the legal community was based on an affidavit of his local counsel.

STATEMENT OF THE CASE

On March 22, 2018, the Trial Court issued a foreign subpoena to Mr. Geitner (“Subpoena”) at the request of Kelly Sims, Appellee herein (“Appellee”). (R. 0016-0078). The underlying action is pending in the Cherokee County Superior Court, State of Georgia, *Sims v. Falcon Ridge, Inc., et al.*, Civil Action File No. 18cve0059 (“Georgia Litigation”). (*Id.*). Pursuant to the Subpoena, Mr. Geitner appeared for his deposition on May 22, 2018, and answered all questions posed to him with the exception of certain questions concerning a settlement agreement with another non-party that contained a confidentiality provision. (R. 0221-0248). The deposition concluded in the ordinary course without suspension. (R. 0247-0102). Over a month later, on June 28, 2018, Appellee filed a *Motion to Compel* (“Motion”) responses to the questions posed concerning the settlement agreement. (R. 0079-0145). On November 5, 2018, the Trial Court held a hearing on the Motion. On December 5, 2018, the Trial Court

entered an order granting the Motion¹. The issue of attorneys' fees was reserved by the Trial Court who ruled on the same based on written submission of counsel for Appellee². (R. 0146-0209). Mr. Geitner opposed the attorneys' fees award by filing a *Brief in Opposition* and an *Affidavit*. (R. 0210-0302). The Trial Court Order awarding attorneys' fees was entered on January 16, 2019. (R. 0001-0004).

The Trial Court Order failed to make specific factual findings of the factors to be considered in determining the reasonableness of the requested attorneys' fees. (Id.). A review of the evidence submitted by affidavit of counsel for Appellee reveals that the award of attorneys' fees is not reasonable as the requested fees include charges for matters other than the motion to compel, unnecessary work and/or work not properly to be included in the request. (R. 0212-0213). The legal work provided did not involve anything unique, extensive or difficult in nature. The issue simply was whether a non-party witness should be compelled to reveal the terms of a settlement agreement entered into with another non-party witness that contained a confidentiality agreement. No South Carolina authority existed on the issue and counsel for appellee submitted persuasive authority on the issue. (R. 0079-0086). Finally, issues exist with respect to the standing and quality of work of Appellee's Georgia counsel, the evidence for which was supplied by his local counsel in the matter. (R. 0149).

¹ Mr. Geitner did not appeal the order granting the Motion. He appeared again for deposition on January 7, 2019 (a date agreed upon by counsel for all parties), and answered all questions posed to him by counsel for Appellee.

² No hearing was held on the issue of attorneys' fees and the criteria to be considered for reasonableness of the same pursuant to *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993). The Trial Court ruled exclusively on the affidavits submitted by Counsel for Appellee. Notwithstanding the Trial Court Order's reference to oral argument in its first paragraph, no hearing was held on the amount or reasonableness of the attorneys' fees requested by Appellee. As a result of there being no hearing on the issue, no transcript was available to be requested or filed.

STANDARD OF REVIEW

The standard of review is that of abuse of discretion. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (S.C. 1993).

ARGUMENT

In awarding attorney's fees, the circuit court should consider the following factors: "(1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained." *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (S.C. 1993). The Trial Court in the Trial Court Order at paragraph 7 summarily referenced the factors to be considered in an award of attorneys' fees rather than making specific factual findings with respect to each of the factors set forth hereinabove. (R. 0002). "The trial court did not make any specific findings regarding attorney fees in the appealed order. Under the recent case of *Blumberg v. Nealco, Inc.*, 427 S.E.2d 659 (Sup.Ct., 1993) modifying *Blumberg v. Nealco, Inc.*, --- S.C. ----, 416 S.E.2d 211 (Ct.App.1992), the trial court is required to make specific findings of fact on the record for each factor set forth in *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961) (the factors are: the nature, extent and difficulty of the services rendered; the time necessarily devoted to the matter; the professional standing of counsel; the contingency of compensation; and the beneficial result accomplished). The trial court failed to make such findings, accordingly, [the Trial Court Order should be reversed] and remand[ed] for specific findings on the award of \$1[4,486.69] in attorney fees." *Visual Graphics Leasing Corp., Inc. v. Lucia*, 429 S.E.2d 839, 842 311 S.C. 484, 490 (S.C. App. 1993); *See also Thomas & Howard Co., Inc. v. T.W. Graham and Co.*, 314 S.C. 410, 444 S.E.2d 541 (S.C. App. 1994) (circuit court order reversed where specific findings on

the required factors not made); *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (S.C. App. 1994) (circuit court order reversed where specific findings on the required factors not made).

"[A]bsent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact." *Blumberg* at 494, 427 S.E.2d at 661. The requested award is unreasonable as sufficient evidentiary support does not exist for all the criteria set forth in *Blumberg*. First, the requested fees for work performed by both Mr. Ichter's firm and Mr. Stanton are for unrelated work, unnecessary work, or work not properly to be included in the request; and, therefore, are not fees customarily charged for similar services nor are they properly included in time and labor devoted to the Motion.

Mr. Ichter's requested fees include the following improperly included entries: a request for reimbursement for work associated with an unrelated deposition (entries on 6/12/18, 10/31/18, and 11/5/18 (R. 0178, 0193, 0195); fees for preparation of pro hac vice ("PHV") motion (entries on 6/28/18, 6/29/18, and 7/12/18) (R. 0181, 0183) and costs for the filing of the PHV (cost entries on 7/16/18 and 7/23/18 (R. 0185); fees for the motion to add Mr. Geitner to the Georgia Litigation (entry on 6/15/18) (R. 0179); a call with Mr. Mackay (entry on 11/5/18) (R. 0195); a total of 9 hours for hearing preparation and travel (entries on 11/4/18 and 11/5/18) (R. 0195); charges for a conference with Plaintiff about upcoming unrelated depositions (entry on 11/13/18) (R. 0196); and two people billing for the preparation of the proposed order which was nothing more than a lifting of language from the Motion (entry on 11/13/18) (R. 0196).

Mr. Stanton's requested fees include the following improperly included entries: researching redaction requirements (entry on 6/19/18) (R. 0153); research on how to use ECF

(entry on 6/28/18) (R. 0153); work related to the PHV motion (entries on 6/29/18, 7/9/18, 7/10/18, 7/11/18, 7/31/18, and 8/10/18) (R. 0154, 0156); a total of 6 hours for phone calls and emails on 9/20/18 and 9/21/18 for rescheduling the hearing on the Motion (R. 0158-0159); and 3.9 hours of legal research on the substance of the motion after the hearing on the motion to compel had already occurred (entry on 11/13/18) (R. 0161).

Second, it cannot be argued that the filing and arguing of the Motion was unique or difficult in nature. **The only issue involved was whether testimony regarding a settlement agreement between two non-parties that contained a confidentiality provision could be compelled.** Notwithstanding Mr. Stanton's submission at paragraph 8 of his affidavit, no other aspect of Plaintiff's case was contingent upon Mr. Geitner's testimony. (R. 0151). Mr. Geitner was involved in only two of ten transactions involving the purchase or sale of horses by Plaintiff over a one and one-half year period of time. (R. 0217). Mr. Geitner testified at his deposition about everything associated with those two transactions. (R. 0216, 0221-0248). The information about which he did not testify involved a transaction between himself and Mr. Mackay which was controlled by a confidentiality agreement. (Id.).

Third, the only evidence of the professional standing/reputation of Mr. Ichter was provided by Appellee's local counsel and is inconsistent with the same enjoyed by Mr. Ichter in Georgia. (R. 0149). Mr. Ichter is known to pursue frivolous claims, unnecessarily expand litigation and otherwise operate in bad faith. (R. 0218, 0250-0302).

Had the Trial Court considered the foregoing evidence and made specific findings related to the same as required by *Blumberg*, the proper result would have been a determination that the attorneys' fees requested by Appellee were not reasonable.

CONCLUSION

This Court should reverse the circuit court's decision and remand this case for proceedings consistent with the Court's decision.

Respectfully submitted, this the 22nd day of August, 2019.

A handwritten signature in black ink, appearing to read "Karl Smith Bowers Jr.", written over a horizontal line.

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